



October 23, 2012

**VIA EMAIL AND U.S. MAIL**

Hon. Isiah Leggett  
Montgomery County Executive  
101 Monroe St., 2<sup>nd</sup> Floor  
Rockville, MD 20850

Dear Mr. Leggett,

I write on behalf of the American Civil Liberties of Maryland concerning what we view as an instance of clearly unconstitutional viewpoint discrimination by the Montgomery County Department of Transportation, Division of Transit Services, in connection with ads that the Fraternal Order of Police, Lodge 35 ("FOP") sought to place on Ride On buses concerning the referendum on Question B on November 6.

Our understanding is that Montgomery County is currently running ads on both the inside and outside of county Ride On buses stating "Who Do You Think Should Run the County Police? The Police Chief or Union Leaders? Vote FOR Question B." Wishing to respond to these explicitly political ads by the County, on October 15, 2012 the FOP contacted Woody Baker, the local sales agent for Direct Media, USA, the contractor responsible for managing the advertising program for the Division of Transit services, seeking information on placing its own ads concerning the same issue. Once the content of the FOP's intended ad became clear, Mr. Baker told the FOP representative that because the ad the union wished to run was political in nature, he did not think it would be approved. The FOP representative asked for formal confirmation of that refusal, but did not hear back that day or the next, despite leaving several messages. On October 17, 2012, the FOP representative spoke with Mr. Baker again, who confirmed that the ad could not run due to its political content. The FOP wishes to run ads explicitly urging a vote *against* Question B. In our view, the First Amendment clearly protects their right to do so, given the County's actions in running its own political ads on the same subject matter in the same forum.

By censoring the FOP's ads concerning Question B, while simultaneously running its own ads on the same topic, in the exact same forum, notwithstanding its supposed policy against political advertising, the County is engaging in unconstitutional viewpoint discrimination. In short, the County is trying to have its cake and eat it too. The County is certainly entitled to take and express a position on Question B. At the same time, the County could (consistently) prohibit all political ads from the designated ad space within the transit system. Alternatively, the County could ban ads on the transit system altogether, or limit the use of the space to itself as the sole speaker. But having opened the forum to outside advertisers, and having flouted its own apparent rules prohibiting political advertising, it cannot then seek to impose those same rules on private speakers who wish to express a contrary viewpoint. If the County wishes to close the ad space to political speech, it must itself abide by this rule. Having flouted the rule with respect to Question B, it must now allow the FOP to speak on the same issue, on the same terms as are available to other private speakers.

When the government is regulating private speech, as is the case here,

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it presumptively violates the First Amendment when it discriminates on the basis of views expressed by private speakers. *See Ark. Educ. Television Comm'n v. Forbes*, 523 U.S. 666, 677, 118 S.Ct. 1633, 140 L.Ed.2d 875 (1998); *Cornelius v. NAACP Legal Defense & Educational Fund*, 473 U.S. 788, 805, 105 S.Ct. 3439, 87 L.Ed.2d 567 (1985). As the Supreme Court has stated, “[i]t is axiomatic that the government may not regulate speech based on ... the message it conveys.” *Rosenberger*, 515 U.S. at 828, 115 S.Ct. 2510.

*Sons of Confederate Veterans, Inc. ex rel. Griffin v. Comm'n of Virginia Dept. of Motor Vehicles* (“SCV”), 288 F.3d 610, 622 (4th Cir. 2002); *accord Pittsburgh League*, 653 F.3d at 296. The prohibition on viewpoint discrimination applies, regardless of whether the ad space in the transit system is considered a public forum, limited public forum, designated public forum, or non public forum.<sup>1</sup> As the Fourth Circuit recently summarized,

Such viewpoint discrimination presumptively is impermissible whether it occurs within or outside a private speech forum. *Forbes*, 523 U.S. at 676, 118 S.Ct. 1633 (stating that viewpoint discrimination is impermissible even where no forum is created at all); *Rosenberger*, 515 U.S. at 828, 115 S.Ct. 2510 (stating that viewpoint discrimination is presumed impermissible in any forum under forum analysis); *Multimedia Pub. v. Greenville-Spartanburg Airport*, 991 F.2d 154, 159 (4th Cir.1993) (same).

*SCV*, 288 F.3d at 622.

The viewpoint discrimination at issue here seems obvious to us, and the prohibition on viewpoint discrimination seems equally clear. We hope, given the clarity of the legal issues, that we can reach a quick resolution of this matter. However, given that the speech at issue relates only to matters to be decided at the referendum on November 6, and the time constraints that that imposes, we request that you let us know no later than Wednesday, October 24 of the County’s intentions, so that we may pursue appropriate relief in the event we cannot reach an agreement.

Sincerely,

David Rocah  
Staff Attorney

cc: Marc P. Hansen, Esq.  
Clifford L. Royalty, Esq.

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<sup>1</sup> For the present purposes, we assume, *arguendo*, that the ad space is a non-public forum, but note that the acceptance of other political or issue ads (including the ads currently running on Question B) are relevant *both* to the forum analysis, and to the question of whether viewpoint discrimination is occurring. *See Lebron v. Wash. Metro. Area Transit Auth.*, 749 F.2d 893, 896 (D.C. Cir. 1984); *Planned Parenthood Ass'n/Chicago Area v. Chicago Transit Auth.*, 767 F.2d 1225 (7th Cir.1985); *New York Magazine v. Metropolitan Transp. Auth.*, 136 F.3d 123 (2d Cir.1998); *Christ's Bride Ministries, Inc. v. Southeastern Pa. Transp. Auth.*, 148 F.3d 242 (3d Cir.1998); *Pittsburgh League of Young Voters Educ. Fund v. Port Auth. of Allegheny County*, 653 F.3d 290 (3d Cir. 2011)